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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM 1964**

**No. 943**

I.EROY COOKS, et al.,

*Petitioners*

vs.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL No. 991 AND LOCAL No. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY,

*Respondents*

**On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL No. 991 AND LOCAL No. 783

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## QUESTION PRESENTED

Did petitioners prove at the trial below that they were discriminated against with respect to promotions because they were Negroes?

## STATEMENT OF THE CASE

The description of the action in the petition is somewhat misleading in that attention is focused on the allegations contained in the complaint rather than on the evidence adduced at trial and the findings and conclusions of the District Court. The complaint alleged that illegal racial

discrimination was practiced against Negroes at the Houston Terminal with respect to promotions from carman helper to temporary car inspector during a twelve year period, i.e.: from March 1, 1943 to June 13, 1955. These allegations were not substantiated at trial, however.

The disputed promotional rights were established in a Memorandum of Agreement effective March 1, 1943, negotiated by the Texas and New Orleans Railroad Company (Railroad) and Brotherhood Railway Carmen of America (Brotherhood), the statutory representative of Railroad's employees situated in the craft or class of carmen. (Plaintiffs' Ex. #3, R. 346-350). It provided that when neither journeymen carmen nor apprentices were available, qualified carmen helpers could be promoted (upgraded) to newly created positions of temporary carmen mechanics. Carmen helpers were to be selected for such promotions on the basis of ability and seniority.

Petitioners were employed as carmen helpers at Railroad's Houston Terminal, at which point the journeymen carmen were assigned as car inspectors. (R. 225). Car inspectors, as distinguished from other types of carmen mechanics (journeymen), were required to be familiar with a number of inspection rules promulgated by the Association of American Railroads as well as the Safety Appliance Laws and Regulations of the Bureau of Explosives of the Interstate Commerce Commission. (R. 407). Carmen assigned as car inspectors were examined periodically by Railroad on these rules and laws. (R. 199-200).

Railroad, with the express or tacit concurrence of the Brotherhood, required initially that carmen helpers who wanted to be set up to temporary car inspectors pursuant to the upgrading Memorandum of Agreement had to learn these various rules and laws, inasmuch as they would per-

form the same duties as the journeymen car inspectors. At first, written tests were given to ascertain whether helpers were conversant with them; thereafter oral examinations were given. (R. 354). The above described requirement for promotion to temporary car inspector positions which was neither unreasonable nor discriminatory (R. 415) continued in effect until 1955, when an acute shortage of helpers who could qualify for promotion developed. Railroad then reduced the standards, and required merely that helpers be able to read and write and be familiar with the tools used in the carmen's craft or class. (R. 355). Petitioners were promoted to temporary car inspectors after the qualifications were changed, commencing on June 13, 1955.

Between March 1, 1943, and June 13, 1955, however, 338 carmen helpers were promoted to positions as temporary journeymen throughout Railroad's system, of whom 163 were Negroes. (R. 357-371). Some of the Negro carmen helpers promoted throughout this period were employed at Railroad's Houston General Shops and were members of the same local lodge of the Brotherhood as petitioners, respondent Local Lodge No. 991 (R. 129, 171). The only journeymen positions to which Negroes were not upgraded at Houston were the positions of car inspectors.

Shortly after the upgrading Memorandum of Agreement became effective, Railroad's car foreman at the Houston Terminal, H. B. Miller, told three of the petitioners that the temporary car inspector positions were for White employees. (R. 27-28, 93-94, 149-150). However, in 1948 and 1949, Miller notified all carmen helpers that in order to qualify for promotion to temporary car inspectors they would have to pass car inspector's examinations. (Defendant's Ex. #4, #5, R. 216, 245-246, 350-351). In a 1949 bulletin posted in both the White and Negro locker rooms he specifically invited all helpers interested in promotion

to come to his office to "write up the examination." None of the petitioners responded to these bulletins.

The fact that carmen helpers could not be upgraded to temporary car inspectors unless they became conversant with the normal car inspection rules and requirements was a matter of common knowledge throughout the period of time covered by the complaint. Brotherhood's General Chairman, E. C. Wolff, in the latter part of 1943 and 1944, prepared over two thousand copies of a typical car inspector's examination, containing the questions and answers thereto, and sent them to the various affiliated local lodges of the Brotherhood on the Railroad. (R. 251). Seventy-five copies were sent to Local Lodge 991 in Houston, Texas. Subsequently, the local chairman, the late Earl Fontenett, who was a Negro, requested and received seventy-five more, (R. 251-252), because he had some helpers who wanted to "study up" on the examination. Fontenett advised his members, including some of the petitioners (R. 167-168, 237-238), that they would have to establish their qualifications for temporary car inspector positions, and at one meeting of Local Lodge 991, he chided the members for not attempting to learn the applicable rules and regulations. He told them that he doubted whether any of them were qualified to be set up as temporary car inspectors. (R. 233-235).

In 1950, General Chairman Wolff by letter, and later in an address to the membership of Local Lodge 991, discussed the right of Negro carmen helpers to be promoted to temporary car inspectors (R. 256-257). Wolff assured the members that they could be promoted but warned that promotions were not based on seniority alone. He said that carmen helpers would have to learn the rules and regulations for car inspectors and be able to stand a written examination on them. Petitioners still failed to apply for

promotion and made no attempt to establish their qualifications for temporary car inspector positions.

The District Court, after hearing the evidence, entered comprehensive findings of fact and conclusions of law (R. 405-416). Among other things the Court found that petitioners, at least from 1948 onward, failed to make reasonable efforts to get themselves promoted and also failed to establish that they possessed the technical ability required for promotion to positions of temporary car inspectors pursuant to the standards imposed by Railroad during the years 1943 to 1955.

## ARGUMENT

The record has been summarized in some detail to show that the District Court's findings of fact, which are of critical importance, were amply supported by evidence adduced at trial. Petitioners attempted to prove that the Negro carmen helpers at the Houston Terminal were ignored or passed over for promotion to temporary car inspectors while White carmen helpers were sought out and offered such positions irrespective of their qualifications for the work. The District Court found that this was not the case but, rather, that carmen helpers, Negro or White, had to apply for the upgraded positions and establish their qualifications for them by taking and passing an examination on the rules and laws pertaining to car inspection. Petitioners failed repeatedly to take advantage of the opportunity to establish their qualifications for upgrading and, thus, created the condition to which they now point as evidence of discrimination.

The District Court's findings of fact were approved by the Court of Appeals. Pursuant to the so-called "Two Court Rule," they should be binding upon the petitioners.

unless clear error can be shown, *Comstock v. Institutional Investors*, 335 U.S. 211, 214 (1948); *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949). Since petitioners have not taken specific exception to any of the District Court's findings, it is assumed they are not disputed.

Petitioners' attack on the judgment of the District Court appears to be based on a premise that proof that no Negroes were promoted at the Houston Terminal for a period of twelve years established a case of discrimination *per se*, rather than on the weight of the evidence. The several 14th Amendment jury-exclusion cases cited by petitioners in support of this premise do not establish any such *per se* rule, however.

The jury-exclusion cases, such as *James Avery v. State of Georgia*, 345 U.S. 559 (1953) and *Smith v. Texas*, 311 U.S. 128 (1940), stand for the more limited proposition that proof of systematic exclusion of Negroes from grand or petit juries establishes a prima facie case of illegal discrimination. Even if it is assumed that the evidentiary rule of those cases is applicable, and that petitioners made out a prima facie case of discrimination, the prima facie case was overcome by persuasive evidence elicited from petitioners' own witnesses on cross-examination, from respondents' witnesses, and from documentary evidence introduced at trial. The rebutting evidence indicated that while petitioners wanted to be upgraded, they did not want to meet the requirements imposed for upgrading. They were, in short, seeking promotional rights in excess of those to which they were entitled at the time under the provisions of the upgrading Memorandum of Agreement.

The Railway Labor Act cases cited by petitioners, *Steele v. Louisville and Nashville R. Co.*, 325 U.S. 192 (1944) and *Conley v. Gibson*, 355 U.S. 41 (1957) hold that a statutory

bargaining representative such as Brotherhood is impressed with a statutory duty to represent all members of the craft or class fairly and without hostile discrimination against any members of a minority group thereof. Such duty is acknowledged, and petitioners did not prove that it was violated.

## CONCLUSION

It is clear that no novel or important question is raised in the petition. The judgment below was based upon findings of fact supported by the evidence adduced at trial and valid inferences and conclusions drawn therefrom. It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This will certify that copies of the foregoing brief in opposition for respondent Brotherhood of Railway Carmen of America, Local No. 991 and Local No. 783, have been served on the opposite parties by depositing copies of same in the United States Mail with First Class Postage Pre paid, addressed to counsel for the said opposite parties, this 29th day of March, 1965.

Donald W. Fisher